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TO AMEMBASSY TOKYO PRIORITY

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E.O. 12965N/A

TAQS:ETRD, EINV, PGOV, JA

**SUBJECT: FOREIGN MINISTRY INTEREST IN DISCRIMINATION CASE,
LISA M. AVIGLIANO, ET AL., AGAINST SUMITOMO SHOJI AMERICA,
INC.**

REF: (A) STATE 227464 (B) TOKYO 16091

1. DEPARTMENT HAS SUPPLIED EEOC (LUTZ PRAGER, ASST. GEN. COUNSEL) WITH LETTER TODAY CLARIFYING OUR VIEWS ON SCOPE OF APPLICATION OF ARTICLE VIII(1) FIRST SENTENCE, OF US-JAPAN FCN. THIS CLARIFICATION WAS BASED ON A CAREFUL REVIEW OF NEGOTIATING FILES OF NOT ONLY JAPANESE FCN, BUT ALSO OTHER FCN NEGOTIATIONS WHICH HAVE DEALT WITH THIS STANDARD TEXT, IN LIGHT OF UNANIMITY OF THREE DISTRICT COURTS WHICH HAVE PASSED UPON THIS QUESTION (HOLDING SUBSIDIARIES NOT REPEAT NOT CONFERNED THIS STAFFING RIGHT SINCE THEY AS LOC:L
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COMPANIES ARE NOT "NATIONALS AND COMPANIES OF OTHER PARTY").

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REVIEWED BY [Signature] **DATE** 9-30-82

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AND IN LIGHT OF APPARENT VIEWS OF DOJ ON ISSUE.

2. LETTER (TEXT FOLLOWS PARA 5) RETREATS FROM EARLIER DEPT. VIEW-REF A THAT BROAD ARTICLE VII ESTABLISHMENT RIGHTS, INCLUDING RIGHT TO LOCALLY INCORPORATE AND TO RECEIVE NATIONAL AND MFN TREATMENT FOR LOCAL SUBSIDIARIES, "OVERFLOWED" AND HAD A BEARING ON INTERPRETATION OF OTHER

ARTICLES DRAFTED IN TERMS OF COVERAGE OF "NATIONALS AND COMPANIES OF THE OTHER PARTY". AS NOTED REF A, THIS ISSUE DOES NOT CONTROL OUTCOME OF ITOH AND SUMITOMO CASES.

3. WE HAVE COME TO FOLLOWING CONCLUSIONS FOLLOWING OUR REVIEW:

-(I) SUBSIDIARIES ARE COVERED BY THE FCN TREATY (THAT THEY HAVE FCN TREATY RIGHTS DOES NOT APPEAR TO BE AT ISSUE IN ANY FORUM) WHENEVER LANGUAGE EXPRESSLY SO PROVIDES BY REFERRING TO FOREIGN CONTROLLED ENTERPRISES, ENTERPRISES IN WHICH FOREIGN INVESTORS HAVE A FINANCIAL OR SUBSTANTIAL INTEREST, ETC. IN PARTICULAR, ARTICLE VII(1) AND (4) PROVIDE SUBSIDIARIES THE KEY RIGHT OF THE BETTER OF NATIONAL OR MFN TREATMENT IN THE CONDUCT OF THEIR ACTIVITIES.

-(II) HOWEVER, LIMITATIONS ON NATIONAL TREATMENT FOR NATIONALS AND COMPANIES OF THE OTHER PARTY MAY ALSO APPLY TO SUBSIDIARIES (E.G., OWNERSHIP OF REALTY; ARTICLE VII(2) AND ARTICLE IX(1)).

-(III) IN SUM, THE RIGHTS OF A SUBSIDIARY AND ITS PARENT JAPANESE COMPANY ARE PRACTICALLY CO-EQUAL UNDER THE FCN, SINCE MOST FCN INVESTMENT-RELATED ARTICLES REFERRING ONLY
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TO "NATIONALS AND COMPANIES" SIMPLY REFINES THE SUBSTANCE OF NATIONAL OR MFN TREATMENT (THAT THE PARENT AND SUBSIDIARIES HAVE UNDER ARTICLE VII) IN SPECIFIC FUNCTIONAL CONTEXTS.

-(IV) THERE ARE A NUMBER OF PROVISIONS, INCLUDING THE FIRST SENTENCE OF ARTICLE VIII(1) (BUT NOT RPT NOT THE SECOND), WHICH CONFER RIGHTS ON A JAPANESE COMPANY IN TERMS OTHER THAN NATIONAL TREATMENT, ARGUABLY CONFERRING BETTER THAN NATIONAL TREATMENT, AND IN THESE FEW CASES, WHICH WE DO NOT CONSIDER VERY MATERIAL, SUCH RIGHTS WOULD

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NOT BE CONFERRED ON LOCAL SUBSIDIARIES.

4. WE THUS CONCUR WITH THE OPINION OF THE COURT IN THE ITOH CASE, CITED IN SUMITOMO AND LINSKEY, THAT LOCAL SUBSIDIARIES ARE COMPANIES OF THE COUNTRY OF INCORPORATION (ARTICLE XXII(3)), AND THAT THEREFORE THEY CANNOT BE CONSIDERED COMPANIES OF THE "OTHER PARTY". AS NOTED REF A, THIS "NATIONALITY"-PROVISION IS DISTINCT FROM, AND NOT INCONSISTENT WITH, THE QUESTION OF FCN TREATY COVERAGE OF SUBSIDIARIES. IN ALL MATERIAL RESPECTS THE FCN TREATY COVERAGE OF SUBSIDIARIES, SET OUT IN ARTICLE VII AND ELSEWHERE WHERE REFERENCE IS MADE TO ENTERPRISES IN WHICH FOREIGN INVESTORS HAVE A CONTROLLING OR OTHER INTEREST, REMAINS EFFECTIVE IN TERMS OF PROTECTING US SUBSIDIARIES AS WELL AS OTHER FORMS OF US COMPANY INVESTMENT IN JAPAN.

5. TEXT OF LETTER:

DEAR MR. PRAGER:

IN RESPONSE TO YOUR LETTERS OF MARCH 14 AND JUNE 21, THE DEPARTMENT HAS CONDUCTED AN EXTENSIVE REVIEW OF THE NEGOTIATING FILES ON OUR BILATERAL TREATIES OF FRIENDSHIP, COMMERCE AND NAVIGATION (FCN), INCLUDING THE 1953 FCN WITH JAPAN, AND HAS CAREFULLY WEIGHED THE QUESTION OF COVERAGE OF SUBSIDIARIES BY THIS TREATY, AN ISSUE IN SPIESS V.

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C. ITOH AND CO. (CIV. NO. 75-H-267, S.D. TEX.) AND TWO OTHER CASES MORE RECENTLY DECIDED IN THE DISTRICT COURT IN NEW YORK (AVIGLIANO V. SUMITOMO SHOJI AMERICA, INC., 77 CIV. 5641 (S.D.N.Y.) AND LINSKEY V. HEIDELBERG EASTERN, INC., 77 CIV. 833 (E.D.N.Y.)).

THE MANNER OF COVERAGE OF SUBSIDIARIES IS IN MANY INSTANCES COMPLEX, MAKING IT NECESSARY TO RELY ON THE INTENT OF THE NEGOTIATORS TO FULLY COMPREHEND CERTAIN PROVISIONS. ON FURTHER REFLECTION ON THE SCOPE OF APPLICATION OF THE FIRST SENTENCE OF PARAGRAPH 1 OF ARTICLE VIII OF THE U.S.-JAPAN FCN, WE HAVE ESTABLISHED TO OUR SATISFACTION THAT IT WAS NOT THE INTENT OF THE NEGOTIATORS TO COVER LOCALLY-INCORPORATED SUBSIDIARIES, AND THAT THEREFORE U.S. SUBSIDIARIES OF JAPANESE CORPORATIONS CANNOT AVAIL THEMSELVES OF THIS PROVISION OF THE TREATY. IN TERMS OF

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SELECTION OF PERSONNEL, MANAGEMENT OR OTHERWISE, THE RIGHTS OF SUCH SUBSIDIARIES ARE DETERMINED BY THE GENERAL PROVISIONS OF ARTICLE VII(1) AND (4), WHICH RESPECTIVELY PROVIDE FOR NATIONAL AND MOST-FAVORED-NATION TREATMENT OF THE ACTIVITIES OF SUCH SUBSIDIARIES. WHILE WE DO NOT NECESSARILY AGREE WITH ALL POINTS EXPRESSED BY THE COURT IN DECIDING THE ITOH CASE ON THE QUESTION OF SUBSIDIARY COVERAGE, WE DO CONCUR IN GENERAL TERMS WITH THE COURT'S REASONING, AND SPECIFICALLY IN THE RESULT REACHED IN INTERPRETING THE SCOPE OF THE FIRST SENTENCE OF ARTICLE VIII, PARAGRAPH 1.

THANK YOU FOR THE OPPORTUNITY TO COMMENT ON THIS ISSUE.

SINCERELY YOURS,

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JAMES R. ATWOOD
DEPUTY LEGAL ADVISER
END TEXT.

6. COPY OF LETTER HAS BEEN PROVIDED TO FIRST SECRETARY
NANAO OF JAPANESE EMBASSY WITH COVER LETTER FROM DLA
ATWOOD.

7. ATTORNEYS RESPONSIBLE FOR PREVIOUS DEPARTMENT POSITION
HAVE COMMITTED HARA-KIRI. VANCE

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